93-886

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FEILBERTO FLORES, ANGEL L. FONTANEZ and AMADOR RODRIGUEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

In *Wheat v. United States*, 486 U.S. 153 (1988), the Court stated that Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. * * * Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

Based on the above, this petition asks:

II.

Whether *Wheat v. United States*, 486 U.S. 153 (1988), sanctions the waiver of conflict-ridden counsel in defiance of the independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them?

III.

Whether the *Wheat* waivers contemplate trial court admonitions which necessarily include, for either Fifth or Sixth Amendment purposes:

1) that petitioners would have time to contemplate or consider his/her decision and could consult, prior to any decision, with independent counsel, either appointed or retained, regarding the pitfalls of the continued retention of conflict-ridden-counsel;

2) that if petitioners agreed that disqualification is appropriate, then new counsel (either retained or appointed) would have ample opportunity to prepare and defend?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App., 1a-25a) is reported at 5 F.3d 1070.

JURISDICTION

The opinion and judgment of the court of appeals was entered on September 23, 1993 (Pet. App., 1a-26a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states in part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

FEDERAL RULE INVOLVED

Rule 44(c), Fed.R.Crim.Proc., states:

> (c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT

On October 31, 1990 an indictment was returned in the United States District Court for the Northern District of Illinois charging petitioners Flores and Fontanez with conspiracy to distribute and possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. On December 20, 1990 a superseding indictment was returned adding Rodriguez (the named petitioner herein) as a joint conspirator. The cocaine conspiracy, per the superseding indictment, alleged drug-related misconduct "beginning at the latest in or about September 1990 and continuing until on or about October 5, 1990" (R. 27).[1]

Each petitioner (save for Fontanez) was denied release pending trial. Each was represented by retained counsel. The *sine qua non* of this petition revolves around the conflicts of interest surrounding petitioners and counsel.

1. On January 29, 1991 (one week prior to the scheduled joint jury trial) the government presented a motion to **disqualify** all defense counsel (Pet. App., 28a-40a; R. 70). The government asserted that the interaction between all defense counsel and the petitioner(s) rose to the level of "**a virtual hornet's nest of conflicts of interest**" (Pet. App., 29a). The government submission noted, *inter alia*, that each attorney had previously represented Rodriguez. Further, the current attorney for Flores had represented Rodriguez in at least two prior prosecutions while the cur-

[1] Flores and Fontanez were arrested in an apartment located on the north side of Chicago during the evening hours of October 4, 1990. Rodriguez was serving a federal sentence imposed for violating federal probation at the time the superseding indictment was returned.

rent attorney for Rodriguez had previously represented Fontanez **in these proceedings** while the remaining attorney (for Fontanez) had represented Rodriguez during recent probation revocation proceedings. Given that scenario, the government maintained that all attorneys should be disqualified (a graphic illustration of the interlocking attorney-client relationship is reproduced at pg. 8, summary of argument, *infra*).

On January 31, 1991 the custodial petitioners were brought before the trial court. The trial court chided the prosecution for failing to earlier call the conflict situation to the attention of the court, but nonetheless proceeded to superficially comply with Rule 44(c). The trial court asked each petitioner a series of "leading" questions that resulted monosyllabic answers (yes/no). Deeming these answers satisfactory, the trial court directed that Flores and Fontanez go forward with their scheduled jury trial on February 8 with the Rodriguez jury trial to follow.[2] Hence, each petitioner remained represented by the same retained attorney.

On February 8, 1991, immediately prior to the commencement of the Flores/Fontanez joint jury trial, counsel for the government filed a "motion for judicial inquiry" (Pet. App., 41a-43a; R. 83). Within that submission government trial counsel notified the trial court that during pretrial interviews with the primary prosecution witness, an informant named Cabral, prosecutors learned that trial counsel for Flores had been paid legal fees by Cabral (wire transfers using multiple fictitious names). Those attorneys'

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[2] The trial court, while declining to disqualify any defense lawyer, *sua sponte* severed the Rodriguez trial from that of the co-defendants/petitioners in an effort to compensate for the conflicts of interest (Tr. 32-33; 1/31/91).

fees were paid toward the representation of Jose Gomez, a drug supplier to the petitioners during the time-frame of the indictment. A terse colloquy surrounding the new government revelations with the attorney in question revealed only his denial of ever receiving fictitious money orders from Cabral for Gomez (while acknowledging he had represented Gomez; transcript reproduced App., 44a-46a).[3] The trial court made no inquiries nor directed any admonitions for the petitioners, *vis-a-vis*, these revelations.

2. The Flores/Fontanez jury trial culminated in plenary guilty verdicts on February 13, 1991 (R. 89). The separate Rodriguez jury trial commenced on February 20, 1991. The Rodriguez jury returned a guilty verdict on February 22, 1991.

In each trial, the government's primary witness was Cabral. In substance, his cumulative testimony revealed that he had peddled cocaine for Gomez from approximately 1988 until Gomez was arrested in late 1989 or early 1990. Petitioners were among Cabral's customer base. Additionally, Cabral (and Gomez) from time-to-time purchased cocaine from petitioners. After Gomez's arrest, Cabral received cocaine on consignment from petitioners. Cabral was arrested by federal agents on October 1, 1990. At that time he was in possession of approximately three kilos of cocaine and $75,000.00. Post-arrest, Cabral opted for a change in lifestyle and agreed to be a federal in-

[3] Cabral was peddling cocaine for Gomez. His customers included the petitioners. Gomez, post-federal-conviction, became a government informant. Cabral later began receiving cocaine, on consignment, from the petitioners. The indictment impleaded, and trial evidence included cocaine related misconduct going back to at least 1988.

formant. For the next few days, under the auspices of federal agents, Cabral picked up cocaine and money. On October 4, 1990, he met Fontanez by pre-arrangement on the north side of Chicago and remitted cocaine and monies to Fontanez. Fontanez carried the merchandise and money to a nearby apartment. Flores was in that apartment, apparently waiting for Fontanez. As Fontanez entered the apartment, so did a group of federal agents. Flores and Fontanez were arrested. The apartment was subject to a plenary search. Additional drugs and drug paraphernalia were seized as were clothing and personal items being stored there for Rodriguez. Flores and Fontanez were immediately charged. Rodriguez remained at-large until October 9, 1990 when he voluntarily surrendered to F.C.I. Terre Haute, Indiana, to commence service of his federal probation revocation sentence. While at large Rodriguez communicated with Cabral.[4] They discussed the possible distribution of another twenty-five kilos of cocaine after Rodriguez was scheduled to depart for service of the federal probation revocation sentence. Rodriguez was not charged in the drug conspiracy until a superseding indictment was returned in late December 20, 1991.

Flores was sentenced on April 3, 1991. Immediately prior to sentencing, Flores submitted a *pro se* Rule 33 motion alleging, *inter alia*, ineffective assistance of counsel. Both the trial court and counsel for Flores suggested the mo-

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[4] The affirming opinion noted:

> Rodriguez explained that if Flores' lawyers said that Cabral was "ok," the two of them would work together in distributing the 25 kilograms. (App. 7a)

The "Flores' lawyers" were Seiden and Samotny. Seiden terminated his Fontanez representation after the return of the superseding indictment, opting to represent Rodriguez.

tion lacked timeliness and same was denied absent a hearing (R. 111).[5]

4. The court of appeals affirmed the convictions.

While rejecting the conflict of interest issue, the court of appeals simply found that per Seventh Circuit precedent the trial judge complied with Rule 44(c) and thus rejected petitioners' Sixth Amendment argument (Pet. App., 14a-15a). While rejecting petitioners' importunings for conviction vacation, the court of appeals eschewed the opportunity for exploration of issues that have split the circuits. Those issues include:

(a) Whether a defendant should be given time to consider the conflict admonitions?;

(b) Whether a defendant should be told that in the event that defendant opts to agree that disqualification is in the best interest, that new counsel may be retained or appointed and that additional trial preparatory time would be available?;

(c) Whether a defendant should be told to consult with independent counsel, either appointed or retained, regarding the pitfalls of continuing with conflict-ridden-counsel?

At bottom, the court declined to recognize any out-of-circuit precedent defining the nature and scope of Rule 44(c) admonitions. Further, the court declined to consider whether the conflicts of interest were so devastating or overwhelming as to proscribe any Sixth Amendment waiver.

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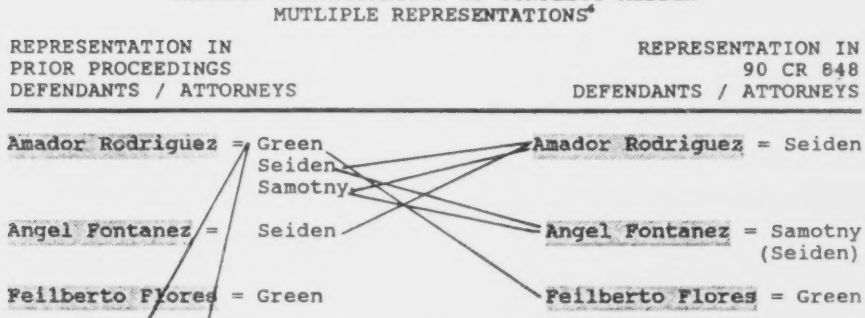
[5] Rodriguez was sentenced to life in prison without parole (R. 119); Flores was sentenced to thirty-three years in custody and Fontanez received a twenty-two year sentence.

REASONS FOR GRANTING THE WRIT

A.

SUMMARY OF ARGUMENT

GRAPHIC DEMONSTRATION OF CONFLICT-RIDDEN MUTLIPLE REPRESENTATIONS[6]


REPRESENTATION IN PRIOR PROCEEDINGS DEFENDANTS / ATTORNEYS
REPRESENTATION IN 90 CR 848 DEFENDANTS / ATTORNEYS
Amador Rodriguez = Green
Seiden
Samotny
Angel Fontanez = Seiden
Feilberto Flores = Green
Amador Rodriguez = Seiden
Angel Fontanez = Samotny (Seiden)
Feilberto Flores = Green
JOSE GOMEZ = Green (Cocaine supplier to Rodriguez/Flores)
CARLOS CABRAL (Paid Gomez legal fees to Green -- primary prosecution witness in this indictment and trials)

86 CR 698*
(N.D. Ill)
U.S. v. Rodriguez
Defendant-Rodriguez
Attorney-Green

86 CR 698***
(N.D. Ill)
U.S. v. Rodriguez
Probation Revocation
Defendant-Rodriguez
Attorneys-Seiden and Samotny

1990 Ohio**
Docket Number Unknown
Ohio v. Rodriguez
Defendant-Rodriguez
Attorney-Green

Attorneys-Seiden and Samotny representing others

90 CR 848****
(N.D. Ill)
U.S. v. Rodriguez
U.S. v. Flores
U.S. v. Fontanez

Defendant-Rodriguez
Attorney-Seiden

Defendant-Fontanez
Attorney-Samotny (Seiden)

Defendant-Flores
Attorney-Green

LEGEND:
(in chronological order)

* First proceeding
** Second proceeding
*** Third proceeding
**** Fourth proceeding

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[6] A picture shows me at a glance what it takes dozens of pages of a book to expound. Ivan Turgenev, *Father and Sons*, ch. 16, Translated by Harry Stevens.

B.

ARGUMENT

The case is of exceptional importance in the administration of federal criminal law.

Reported opinions fail to reveal any parallel decisions in this issue. Perhaps the most telling reason that research discloses no such parallel decisions is simply because the Court has not seen a **hornet's nest of conflicts** similar to that at bar in any reported federal criminal decision.

Bedrock Sixth Amendment principles note that the duty of loyalty to a client is "perhaps the most basic" responsibility of counsel and that "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interest."[7] Of course, conflict-free assistance of counsel is a clear component of the Sixth Amendment.[8] The opinion of Chief Justice Rehnquist in *Wheat* fails to provoke any analytical tension. In *Wheat* the court found, *inter alia*, that the integrity of the court, professional ethical responsibilities and the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.[9] Indeed, *Wheat* states:

> "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."[10]

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[7] *Strickland v. Washington*, 466 U.S. at 692, 104 S.Ct. at 2067.

[8] *Glasser v. United States*, 315 U.S. at 60, 70, 62 S.Ct. 457, 464 (1942).

[9] 486 U.S. 153, 160, 108 S.Ct. at 1698, citing *Glasser v. United States*, with approval.

[10] 486 U.S. at 160, 108 S.Ct. at 1698.

Hence, it is reasonable to conclude that the Court has never sanctioned waiver at the whim of the defendant. Were it otherwise, *Wheat* would have been decided differently.

At bar, each defense attorney had unquestioned divided loyalties. As to **Attorney Green**, representing Flores, those loyalties were fractured almost beyond imagination: In prior federal proceedings, Attorney Green had represented Rodriguez as well as Gomez. Green was paid for representing Gomez by Cabral who is the primary prosecution witness against Rodriguez. Cabral was also the primary prosecution witness against Flores.

Seiden and Samotny represented Fontanez early on in this case. Prior to representing Fontanez, both had represented Rodriguez in federal criminal probation revocation proceedings.[11] Rodriguez needed Fontanez as a witness at sentencing. Seiden reported to the court that Fontanez would not testify.[12] Notwithstanding the impleaded conflicts, none of the defense lawyers called any of their collective antagonistic interests to the attention of the trial

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[11] In *United States v. Tatum*, 943 F.2d 370, 378-79 (4th Cir. 1991), the court found reversible error based upon conflicts involving trial and co-counsel. The court endorsed a vicarious conflict theory of prejudicial error based on counsel(s) close association. In *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252-54 (9th Cir. 1989), the court found prejudicial error under a conflict of interest theory while noting that conflicts arise in both *simultaneous* and *successive* representations of defendants and co-defendants . . . citing *Wheat*, with approval at 1252.

[12] This even though Fontanez had been convicted several weeks earlier in that severed trial under the same indictment. Attorneys Seiden and Samotny shared offices at 180 W. Washington, Chicago, Illinois, prior to and during these trials. Attorney Green lived in Hawaii prior to and during these trials.

court.[13] Government counsel, one week prior to the scheduled joint jury trial, filed a motion to **disqualify** all defense counsel insisting that the **hornet's nest of conflicts** compelled disqualification.[14]

The Court need only imagine the scenario. Trial is a week away. Petitioners, clad in prison garb, are paraded into the well of the court. Prosecutors, defense counsel and court personnel surround them. The petitioners had never previously spoken to the court.[15] Out of nowhere,

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[13] In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), Justice Powell noted: "The private bar may be less alert to the importance of avoiding multiple representation in criminal cases.", 446 U.S. at 346 and n.11 citing, with approval, *Lowenthal*, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va.L.Rev. 939, 950 and n.40 (1978) and *Geer*, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. 119, 152-157 (1978). The unwritten reality is simply that either discharge or disqualification means the remittance (back to the defendant) of attorneys' fees, hence the reluctance of the private criminal defense bar to, *sua sponte*, bring conflict questions to the attention of the trial court. See *Wood v. Georgia*, 450 U.S. 261, 267-271 (1981). Attorneys appointed by the court, or members of a public defenders office, lacking fiscal incentive, infrequently become embroiled in [even potential] conflict-of-interest situations.

[14] On appeal, the government changed theories. No longer asserting the "hornet's nest" conflict concept, the government defended the failure to disqualify based upon petitioners' waivers.

United States v. Iorizzo, 786 F.2d 52, 57 (2nd Cir. 1986), is strikingly similar. In *Iorizzo* the government demanded disqualification below, urging that defense counsel had an irreconcilable conflict of interest. While reversing federal mail fraud convictions, predicated on trial counsel's conflict-of-interest, the court of appeals specifically noted that the government changed theories from the District Court to the Court of Appeals (. . . "The government responds with arguments that are entirely at odds with the position taken in the district court" . . . 786 F.2d at 57).

[15] The petitioners were arraigned on the superseding indictment on January 8, 1991. Defense counsel entered pleas of not guilty and waived the formal reading of the indictment. The petitioners did not address the court.

the harried trial judge understandably eager to keep to a schedule commences to relate a litany constitutional theories surrounding conflicts of interest. Each attorney denies any conflict. The record fails to support the notion that any of the petitioners had received or reviewed the government's **hornet's nest-disqualification** motion (Flores and Rodriguez were brothers, Fontanez was their brother-in-law).[16] The court asks only "leading" questions of each petitioner, receiving only monosyllabic answers. The trial court erroneously suggested, while severing Rodriguez's trial from the Flores/Fontanez trial, that the separate Rodriguez trial would dissipate the need for disqualification.[17] The government will **concede** that the trial judge failed to offer petitioners either any time to contemplate the constitutional waiver or any opportunity to consult with independent counsel. Further, the trial judge eschewed an admonition that in the event of disqualification, new counsel, either retained or appointed, would be available and given ample opportunity to prepare and defend.

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[16] In *United States v. Friedman*, 854 F.2d 535, 572-74 (2nd Cir. 1988), the court, while affirming various RICO convictions, noted that *Friedman*, an attorney, had seen the government's disqualification motion regarding his trial counsel at least a week prior to the hearing and *Friedman* filed his own affidavit in opposition of disqualification. While affirming the court noted that second circuit precedent counsels against asking questions designed to elicit mere "yes" or "no" answers and that in each instance the court should determine whether the defendant has had a reasonable time to digest and contemplate the risks posed by the conflict of interest . . . *Id.* at 574.

[17] In *Nealy v. Cabana*, 782 F.2d 1362, 1363, 1366 (5th Cir. 1986), the court found prejudicial error in a conflict of interest situation while noting that severance was not the appropriate antidote for prejudice flowing from a conflict of interest.

Still further, on February 8, 1991 (apparently prior to jury selection) the government filed a renewed submission ("motion for judicial inquiry"; App. 41a-43a). Government counsel explained that attorney Green (now representing Flores) had received substantial attorneys' fees from informant Cabral. These fees involved money orders bearing fictitious names (App. 41a-46a) and were paid to Green while he was representing Gomez (the cocaine supplier for the petitioners and Cabral in 1988-1989).[18] The trial judge spoke only to attorney Green, never to the petitioners. The failure of the trial judge to make further inquiry of the petitioners is startling. It suffices to say that the relationship between counsel and the informant presented an irreconcilable conflict of interest.[19] Predicated on "waiver" answers from the petitioners the Court of Appeals found that which is tantamount to the forfeiture of Sixth Amendment protections (App. 13a-15a).[20]

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[18] In *United States ex rel. Stewart v. Kelly*, 870 F.2d 854 (2nd Cir. 1989), the court, citing *Wheat* with approval, found that the trial court was correct in compelling disqualification where defense counsel had previously represented the prosecution informant. The court noted that the trial court has "an independent duty to ensure that criminal defendants receive a trial that is fair," 870 F.2d at 856, citing *Wheat*, 108 S.Ct. at 1697.

[19] In *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993), the court traces precedent on the subject of an attorney's involvement in a similar or related offenses. The *Fulton* opinion notes that the Seventh Circuit apparently splits from sister circuits in not **compelling** disqualification, 5 F.3d at 609-614.

[20] While affirming, the court of appeals cited only Seventh Circuit decisions. The court of appeals declined to consider out-of-circuit authority clearly pointing to a different result, e.g., *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir. 1982), (doubts regarding disqualification to be resolved in favor of disqualification); *United States v. Jenkins*, 943 F.2d 167, 176 (2nd Cir. 1991), (defendant encouraged to seek independent counsel and allow a reasonable time for the

(Footnote continued on following page)

The court below erroneously bottomed affirmation on waiver. Yet this Court has consistently noted:

> The government bears the burden of proving the waiver. See *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977) ("it [is] incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' ") (citations omitted). "Courts should 'indulge every reasonable presumption against waiver,' and they should 'not presume acquiescence in the loss of fundamental rights.' " *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (citations omitted).[21]

The present petition impleads, *inter alia*, the concept of an inadequate waiver. Petitioners point out that the trial court seemingly demanded an on-the-spot waiver.

The petitioners make dual assertions. Petitioners assert that given the **magnitude** of the conflicts below, the trial court was precluded from finding a waiver. If ever there was a situation where either the independent public interest in the fairness of federal criminal trials or the in-

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[20] *continued*

defendant to make his decision); *United States v. White*, 706 F.2d 506, 508-510 (5th Cir. 1983), (concluding that inadequate waiver admonitions obviated the need to determine whether certain conflicts rendered any waiver viable). In *United States v. Martinez*, 630 F.2d 361, 364 (5th Cir. 1980), the court vacated certain drug convictions where defense counsel had a clear conflict. Citing Fifth Circuit precedent the court found ". . . the trial judge should affirmatively participate in the waiver decision by eliciting a statement **in narrative form** from the defendant . . ." *Id.* at 364. The Seventh Circuit has eschewed the "**narrative form** from the defendant" waiver requirement.

[21] *United States v. Lopez-Vasquez*, 1 F.3d 751, 753-54 (9th Cir. 1993). In *Lopez-Vasquez*, a divided court found that silent waivers in connection with appellate deportation orders violated due process.

tegrity of the legal profession mandated disqualification, this is that case.

One can imagine the public's perception of a federal criminal trial in which the participating defense lawyers had involved unwitting defendants in an ongoing game of musical chairs.[22] Where one of the attorneys had also represented the conspiratorial drug supplier, work for which he was paid in fictitious money orders by the prosecution's primary witness. Where three imprisoned Spanish-speaking defendants are hauled into a United States federal court and compelled to quickly weigh government accusations against their lawyers. It is a dilemma of the highest order: Here are the attorneys paid (by whom?) to save them. There is the government that is out to put them away. What nefarious plot is the government hoping to hatch by this sudden interest in their rights? Absent time and objective counsel, absent a clear articulation of all alternatives, turned suspicious by lack of knowledge and cultural understanding, they choose the wide road: they go with what they know. Is it not the duty of the trial court to, at a minimum, show the defendants that the other road is travelable? Can the trial court simply abdicate that responsibility to the confused whim of an untutored layman.[23] Given the above, precedent demands disqualification.

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[22] A game in which the participants (save one) are inevitably left standing alone. Also called "Going to Jerusalem."

[23] In *Ward v. United States*, 995 F.2d 1317, 1322 (6th Cir. 1993), a divided panel granted § 2255 relief finding that the trial court has the duty to determine . . . whether counsel's representation falls below **an objective standard of reasonableness** (our emphasis). The court further noted the court could not abdicate that responsibility to the parties or their families, *Id.* at 1322.

Petitioners maintain that admonitions designed to eclipse federal constitutional protections must be comprehensive. Those admonitions must necessarily include an opportunity for quiet reflection, contemplation and at least the potential for independent advice. A defendant must be advised regarding the consequences of the trial court's "warnings." If the trial court warns a pre-trial detainee about the pitfalls of multiple conflicts of interest, must not the trial court also tell the federal-pre-trial-detainee, that if the retained attorney is discharged (or disqualified) then new counsel, either retained or appointed, would be available with adequate time to consult, prepare and defend? The necessary ingredients of a valid waiver necessarily include the above components. Absent same, there can be no viable constitutional waiver.[24]

CONCLUSION

The circuits are divided on the nature and extent of waiver-admonitions and whether certain conflicts compel *per se* disqualification.

Wheat observed that federal courts have an obligation to ensure "that legal proceedings appear fair to all who observe them," 108 S.Ct. at 1697.

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[24] In *United States v. Dolan*, 570 F.2d 1177, 1181 (3rd Cir. 1978), the court affirmed an order of disqualification while noting that the inquiry process should follow *Rule 11* procedures citing, with approval, *Garcia v. United States*, 517 F.2d 272, 278 (5th Cir. 1975). *Dolan* further pointed out that the conflict inquiries are *complex and subtle*. *Id.* at 1181. *Dolan* also endorses the proposition that outside counsel might be consulted, *viz.*, disqualification *vel non*. *Dolan* was cited with approval in *United States v. Wheat*, 486 U.S. at 162, 108 S.Ct. at 1698-99.

This case provides an appropriate vehicle for the resolution of questions not reached in *Wheat v. United States*, 486 U.S. 153 (1988).

Wherefore, petitioners respectfully request that this petition for writ of certiorari be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-1839, 91-1854, and 91-2007

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FEILBERTO FLORES, ANGEL L. FONTANEZ and AMADOR RODRIGUEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 CR 848—**Suzanne B. Conlon,** *Judge.*

Nos. 92-1203 and 92-1204

FEILBERTO FLORES and AMADOR RODRIGUEZ,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 6959—**Suzanne B. Conlon,** *Judge.*

ARGUED APRIL 28, 1993—DECIDED SEPTEMBER 23, 1993

Before BAUER, *Chief Judge*, COFFEY, *Circuit Judge*, and EISELE, *Senior District Judge.*[1]

BAUER, *Chief Judge.* Feilberto Flores, Angel L. Fontanez, and Amador Rodriguez ("defendants") are three forcibly retired entrepreneurs. Like many successful entrepreneurs, they ran a well-organized commercial enterprise and made a substantial profit.[2] There was however, a difference in their business from the American norm. They applied their money-making skills to marketing, distributing, and selling an illegal product: cocaine, lots of cocaine. Eventually, Flores, Fontanez, and Rodriguez were forced into "retirement." All three were indicted, tried, and convicted of crimes. Flores was convicted of one count of conspiring to distribute cocaine, three counts of illegally using a communication facility to facilitate drug trafficking, and two counts of possession with the intent to distribute cocaine in violation of 21 U.S.C. §§ 846, 843(b), and 841(a)(1) respectively. Fontanez was convicted of one count of conspiring to distribute drugs and two counts of possession with the intent to distribute drugs in violation of 21 U.S.C. §§ 846 and 841(a). Finally, Rodriguez was convicted of conspiring to distribute cocaine in violation of 21 U.S.C. § 846. Flores was sentenced to 364 months in prison, Fontanez was sentenced to 264 months, and Rodriguez was sentenced to life without parole. The district court also fined Flores and Rodriguez $25,000 each. In this consolidated appeal, all three challenge their convictions and sentences. Additionally, Flores and Rodriguez petition for relief pursuant to 28 U.S.C. § 2255 ("section 2255") for alleged constitutional violations surrounding their convictions. We affirm their convictions and sentences, and deny Flores and Rodriguez section 2255 relief.

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[1] The Honorable Garnett Thomas Eisele, Senior Judge of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

[2] In fact, theirs was a family business of sorts. Rodriguez and Flores are half-brothers and Fontanez is married to their younger sister.

I. Facts

The facts of this case read like a poor take-off of a James Bond movie. This sordid tale includes such clever gadgets as hidden, electronically-controlled drug compartments custom-built into cars, beepers, mobile telephones, and hidden electronic transmitters and tape-recorders. Also a part of this criminal story were code words used to disguise references to narcotics during telephone conversations, and a stash apartment, a place that contained little else but a stockpile of narcotics and items used to package and distribute narcotics.

From the summer of 1988 until their arrests in October 1990, Flores and Rodriguez engaged in a cocaine operation that was responsible for moving at least 1500 kilograms of cocaine on the streets of Chicago. At their trials, cohort Carlos Cabral testified for the prosecution. Cabral's drug-dealing activities with Flores and Rodriguez stretched back to at least the summer of 1988. During those initial deals, Flores and Rodriguez each received multiple kilograms of cocaine from Cabral for which they paid him substantial amounts of money. Over the next two years, Flores and Rodriguez dealt drugs with Cabral hundreds of times. Eventually, their roles switched as Flores and Rodriguez began supplying drugs to Cabral who then would sell the drugs on their behalf.

By the summer of 1990, Fontanez had joined the operation. Cabral testified that Fontanez worked with Flores in dealing kilogram quantities of cocaine. Cabral said that he first saw Fontanez in the summer of 1990, when Fontanez accompanied Flores to a meeting with Cabral. Cabral stated that at this meeting he handed a kilogram of cocaine to Fontanez. Cabral also testified that Fontanez was present at drug transactions involving Flores or Rodriguez and Cabral on four or five occasions between the summer of 1990 and October 1990. In a meeting with Cabral in October 1990, Rodriguez described Fontanez as a "trusted worker" who had been working with Flores and him for a long time.

Cabral testified to eleven specific cocaine transactions by Flores, Fontanez, and Rodriguez during the three months preceding their arrest. Each delivery consisted of six to thirteen kilograms of cocaine.[3] Cabral would take the cocaine, sell what he could, then return any unsold amounts along with payment for the sold cocaine. On October 1, 1990, FBI agents picked up Cabral while he was trying to sell cocaine that he had received from Flores. Cabral told the FBI agents about his narcotics dealings with Flores, Fontanez, and Rodriguez and directed the agents to a hidden compartment in his car that contained four kilograms of cocaine. The agents also recovered $71,500 in cash from Cabral's car, and another $79,000 from Cabral's residence. The four kilograms of cocaine and the cash were on their way back to Flores.

Over the next few days, Cabral recorded telephone conversations with and led FBI agents to his cocaine customers. The FBI seized additional money and cocaine from those individuals. Cabral also had several tape-recorded conversations with Flores, and one with Rodriguez, regarding the distribution and sale of cocaine. During these conversations, which were played and explained to the juries, Flores and Rodriguez used code words to mask references to their illegal activities. For example, they referred to cocaine as "cars" and "roast pork." Flores made arrangements with Cabral for the return of the money and unsold cocaine (the same money and cocaine seized by the FBI at Cabral's arrest). Both Flores and Rodriguez

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[3] Rodriguez made two deliveries at a garage on Montrose Avenue, one for eight kilograms and one for twelve kilograms, for which Cabral paid him $27,000 per kilogram. Flores and Fontanez made two deliveries of between eight and ten kilograms each at Touhy Avenue and the Edens Expressway. Flores made two deliveries at Cicero and Peterson streets for six and eight kilograms respectively. Flores and Rodriguez made two eight kilogram deliveries to a garage at Lawndale and Argyle streets. Finally, there were three deliveries by Flores and Fontanez to a 7-11 store at Montrose and Marmora streets of six to thirteen kilograms of cocaine at each delivery.

talked to Cabral about the distribution of the next shipment of cocaine, which was to take place a few days later.

Flores and Cabral scheduled a meeting for the evening of October 4, 1990. Cabral reported to Flores that he had six "cars" to return to Flores. Flores set the meeting for 6:30 p.m at a 7-11 store and explained that he was "waiting for my worker," which Cabral understood as Angel Fontanez.

To prepare Cabral for the meeting, FBI agents placed six kilograms of cocaine in the trunk of Cabral's car and placed two boxes full of paper strips (to pass for money that Cabral owed Flores for the other seven kilograms) in Cabral's back seat. The agents also provided Cabral with an electronic transmitter and a recording device so that they could monitor and record the meeting. Prior to Cabral's arrival at the 7-11, other FBI agents stationed in the area noticed two cars following each other very closely, a gray Lincoln and a tan Buick Riviera with dealer plates. The cars drove past the 7-11 and turned down a nearby alley. Earlier that day, the agents had spotted the same Lincoln at a car lot owned by Flores and at which Rodriguez worked.

When Cabral arrived at the 7-11, he did not see Flores, so he called him. Shortly after this call, Fontanez approached Cabral's car on foot and climbed into the front seat. Fontanez and Cabral had a brief conversation about the cocaine and money that Fontanez was to receive. Fontanez retrieved the boxes of fake money from the back seat while Cabral took out the six kilograms of cocaine from the trunk. Fontanez told Cabral that Flores had not allowed him to use a car to pick up the drugs and the money. Fontanez then took the packages in his arms, walked across the street, stopped briefly at a nearby bench, and rearranged his load before heading down an alley.

FBI agents followed Fontanez. FBI Special Agent Scott Jensen yelled to Fontanez as he was entering a second-floor apartment by way of a rear, exterior staircase. Jensen ran up the staircase in pursuit of Fontanez. When

he reached the second floor landing, Jensen looked into the door of the apartment and spotted the packages containing the cocaine and fake money on the kitchen counter. Jensen called out to Fontanez and said that he wished to speak to him, at which point Jensen noticed a second person—Flores. Jensen then identified himself as an FBI agent, entered the apartment, and ordered Fontanez and Flores to get down on the floor.

After arresting Flores and Fontanez, the FBI agents conducted a protective sweep to make sure that no one else was in the apartment. With the area secured, the agents obtained and executed a search warrant for the apartment. In their search of the apartment, which had been rented by Fontanez since February 1990, the agents found the six kilograms of cocaine that Fontanez had just brought in with him, approximately 1.5 additional kilograms of cocaine, and 158.77 grams of heroin. In one of the bedrooms of the apartment, the agents found three packages of cocaine under the bed, two plastic baggies filled with cocaine underneath a small dresser, and an Ohaus triple-beam scale, the type of scale often used to weigh narcotics. In the dresser, the agents discovered a large stash of empty plastic baggies of the kind commonly used to package and distribute narcotics. They also found a handwritten note that contained numbers which indicated the conversion from grams to ounces. In the kitchen, the agents found more boxes of plastic baggies, the six kilograms of cocaine that Fontanez brought in with him, and no food, other than a bottle of champagne and half a wedding cake in the refrigerator. From the dining room table at which Flores had been sitting when Jensen first looked in the apartment, the agents recovered a large wad of cash, a mobile telephone, and a set of keys that fit a tan Buick Riviera that was parked out front of the apartment building. The tan Buick was one of Flores' four cars into which Cabral had installed a hidden, electronically controlled secret compartment, and was the same car the surveillance agents had seen driving by the 7-11 just before the Cabral-Fontanez meeting. In the other bedroom of the apartment,

the agents' found a small, empty box marked "Ohaus" and other boxes that contained documents with Amador Rodriguez's name and, in some cases, signature. These documents included car titles, other official documents, and letters. The agents also seized $5,400 in cash from Flores' pocket.

On October 5, 1990, the day after the arrest of Flores and Fontanez, Rodriguez contacted Cabral.[4] In tape-recorded conversations, Rodriguez expressed his anxiety at the arrest of Fontanez and Flores, as well as his desire to meet with Cabral immediately. Rodriguez told Cabral to be "all showered and very clean" for their meeting. These code words meant that Cabral should bring no drugs with him.

Cabral met with Rodriguez later that day. FBI agents watched that meeting and monitored an electronic transmitter worn by Cabral during the meeting. Rodriguez began by expressing his suspicion that Cabral was working with the government, and told Cabral that he would soon learn from Flores' lawyers if that were so. In a wily strategic maneuver, Cabral suggested that Fontanez might be the informant. Rodriguez rejected that suggestion and explained that Fontanez had been a trusted worker for a long time. Inexplicably, Rodriguez repeated his suspicions, but then threw caution to the wind and carried on as if Cabral posed no threat to his criminal enterprise. Rodriguez refocused his attention on matters he obviously viewed as more important: the current status of his cocaine business. He did this by talking to Cabral about the distribution of a 25-kilogram shipment of cocaine. Like any other commercial enterprise that has lost the services of two highly-valued workers (here, Flores and Fontanez), Rodriguez had to rely on those who, like Cabral, were still able to contribute their labor to the business. Rodriguez explained that if Flores' lawyers said that Cabral

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[4] Only the jury in the Rodriguez trial heard evidence of contacts between Rodriguez and Cabral after Flores and Fontanez were arrested.

was "okay," the two of them would work together in distributing the 25 kilograms. Cabral and Rodriguez spoke by phone the next day, October 6, 1990, and discussed the details of Flores' and Fontanez's arrest.

The government presented other evidence at the two trials conducted in this case, including telephone records that demonstrated extensive contact between and among Cabral, Flores, Fontanez, and Rodriguez during September and October 1990. The government produced evidence of calls to and from Flores' mobile phone, Rodriguez's mobile phone, and the phone at Flores' car dealership. Also, the government introduced evidence that Fontanez had a beeper listed in his name. This beeper was operational at least as early as September 19, 1990.

Flores and Fontanez were tried together. Rodriguez was tried separately. All three were found guilty and sentenced. All three appeal.

II.

Flores, Rodriguez, and Fontanez raise several issues on appeal. None impel a reversal.

A. Conflict of Interest of Trial Counsel

Flores, Rodriguez, and Fontanez all claim that their right to conflict-free trial counsel was violated. Rodriguez and Flores—as their enhanced sentences reveal—have a long history of criminal activity that precedes their cocaine distribution business in this case. Each needed lawyers to represent them in their prior run-ins with the law. In this case, they needed lawyers again. So, like sick patients who call up longtime family doctors, they contacted attorneys who had represented them before. Potential conflict of interest problems developed, however, as the three defendants and their attorneys played a virtual musical chairs game of attorney-client relationships. The lawyers chosen to represent Flores and Fontanez, respectively Michael Green and Roberta Samotny, represented Rodriguez in

prior, unrelated criminal proceedings. Further, Rodriguez's counsel, Glenn Seiden, initially represented Fontanez in the current case then switched to Rodriguez. The government asked the district court to disqualify all three lawyers because of alleged actual and potential conflicts of interest. The court held a hearing on the matter pursuant to Federal Rule of Criminal Procedure 44(c).[5]

At the hearing, the district court asked the defendants and their respective attorneys about the alleged conflicts. The court questioned each attorney to make sure he or she had explained the problem to their respective clients. The court then asked each defendant if he wanted to continue with his current counsel. The court's questioning of Flores went as follows:

> THE COURT: I want you to understand that under the Constitution, you have the right to have an attorney that represents your own personal best interests, nobody else's. Do you understand that?
>
> MR. FLORES: Yes, yes.
>
> THE COURT: And my concern is that your present attorney, having represented Mr. Rodriguez, that you understand that it is your best interests you must consider and your attorney must consider and not Mr.

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[5] Rule 44(c) states in full:

> **(c) Joint Representation.** Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Fed. R. Crim. P. 44(c).

Rodriguez's best interests. His attorney must consider his best interests, and I want you to understand that fully.

And I'd like to mention to you some of the potential—and I don't know that this would ever happen, but I want you to understand why I'm concerned. In the event Mr. Rodriguez decided to take the witness stand and cooperate with the government and testify against you, your attorney might be in the position of cross-examining somebody he once had an attorney-client relationship with. And that presents two types of problems. One is will he zealously and conscientiously represent your interests against his former client's interests; or, on the other hand, from Mr. Rodriguez's point of view, will he, because he knows Mr. Rodriguez, be at an unfair advantage because of that prior relationship.

So I want you to be aware of this situation. Have you thought about, under these circumstances, have you though about whether you wish Mr. Green to continue representing you in this case?

MR. GREEN: She's asking if you've thought about whether you want me to continue being your lawyer. You have to answer her.

MR. FLORES: Yes, your Honor.

THE COURT: . . . [Y]ou must be free to get the kind of objective legal advice on [the issue of cooperation with the government] if you're at all concerned or wish to consider any advantage to you . . . . That's another matter that you should consider in deciding whether or not you wish Mr. Green to represent you. Do you understand what I'm talking about?

MR. FLORES: Yes, your Honor.

THE COURT: Does it make sense to you? All right. Well, having considered these matters, what do you wish to do?

MR. GREEN: Do you want me to be your lawyer or not?

MR. FLORES: Yes, I would like him.

THE COURT: You wish to continue with Mr. Green's representation?

MR. FLORES: Yes, your Honor.

January 31, 1991 Transcript at 13-15. Next, the court questioned Samotny and Fontanez. That exchange went as follows:

THE COURT: All right. Mr. Fontanez—well, let me ask you, Miss Samotny. Have you gone over with Mr. Fontanez his right to counsel and the implications involved in that?

MS. SAMOTNY: Certainly I have, Judge.

THE COURT: And Mr. Flores, I myself—I'm sorry, Mr. Fontanez, I myself must advise you of your right to counsel, and that means an attorney who will act in your own personal best interests and no one else's. Do you understand what I'm saying?

MR. FONTANEZ: Yes.

THE COURT: . . . I want you to understand that your attorney and your relationship is a confidential matter. It's not something I want to get into in terms of anything said between you, but I want you to also understand that the person who represents you must represent only you and do what would be best for you, particularly in view of the fact you have no prior felony conviction, that you may wish to testify on your own behalf because you have no prior felony conviction, and it might be in your best interests to do so. I don't know what the facts that go into that decision are in this case, but it might be in your best interest. It might be in your best interest to cooperate with the government because it might, in effect, reduce your potential sentence. Are you aware of these things?

MR. FONTANEZ: Yes, I do.

THE COURT: And have you given some thought as to whether or not you wish Miss Samotny to continue representing you in this case?

MR. FONTANEZ: Yes, I would like for her to represent me.

THE COURT: All right. Thank you.

Id. at 19-21. Finally, the court questioned Seiden and Rodriguez:

THE COURT: Have you advised Mr. Rodriguez about the potential problem of your having appeared on behalf of Mr. Fontanez?

MR. SEIDEN: Prior to the 44(c) motion we received the day before yesterday, I've had individual—I found it necessary to have individual, of course, individual meetings with my client wherein I had to advise him that I was interested in him, only him, and that we would not be meeting with attorneys or other family members. Yes, we have discussed this in some detail, Judge.

THE COURT: All right. I would like to address Mr. Rodriguez directly—

MR. SEIDEN: Please.

THE COURT: —on this issue.

Mr. Rodriguez, I wish to tell you that under the Constitution of the United States, you have the right to have a lawyer represent you that represents you, only you, in your own personal best interests. Do you understand that?

MR. RODRIGUEZ: (Through interpreter:) Yes.

THE COURT: Do you understand that you must make your own decisions in this case with the assistance of an attorney—

MR. RODRIGUEZ: (Through interpreter:) Yes.

THE COURT: —who will consider your interests, rather than those of your co-defendants? Even though they're family members, and I understand you're concerned what happens to your family, your attorney must be your own loyal spokesman here in the court and no one else's. Do you understand that?

MR. RODRIGUEZ: (Through interpreter:) Yes, yes.

THE COURT: Have you thought about this matter?

MR. RODRIGUEZ: (Through interpreter:) Yes.

THE COURT: What do you wish to do?

THE COURT: Do you wish Mr. Seiden to continue to represent you in this matter?

MR. RODRIGUEZ: (Through interpreter:) Yes.

THE COURT: All right, thank you.

Id. at 25-26. The district court respected the expressed preferences of each defendant and declined the government's invitation to intrude into the defendant's counsel of choice. *Id.* at 32. The court concluded that a severance was the best way to deal with the situation and therefore scheduled a separate trial for Rodriguez. *Id.*

On appeal, the government claims that Flores, Fontanez, and Rodriguez waived their right to conflict-free counsel by their answers at the Rule 44(c) hearing. The defendants counter by arguing that the district court should not have accepted their waivers because their waivers were not knowingly or intelligently made. They charge that the district court failed to make a detailed inquiry into how the conflict of interest might relate to the individual defendants and note that the defendants' answers were usually only one or two words. These arguments lack merit.

First of all, there is no requirement that the district court follow some pre-ordained, detailed script when eliciting a criminal defendant's waiver of the Sixth Amend-

ment right to conflict-free counsel.[6] *United States v. Roth*, 860 F.2d 1382, 1387-88 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989). We do not ask whether a defendant's decision to waive is foolish. Rather, we ask only whether the defendant made an informed decision. A waiver is sufficient if it was made knowingly and intelligently, that is to say, if it was made with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Lowry*, 971 F.2d 55, 60 (7th Cir. 1992). The district court need not conduct a long-winded dialogue with counsel and defendants when inquiring about a waiver. *Roth*, 860 F.2d at 1389. It is enough that the district court inform each defendant of the nature and importance of the right to conflict-free counsel and ensure that the defendant understands something of the consequences of a conflict. *Id.* at 1388.

The district court in this case satisfied these standards. The transcript of the Rule 44(c) hearing reveals that the district court carefully questioned each attorney and each defendant about potential and actual conflicts created by the prior representation of co-defendants. After the district court explained the right to conflict-free counsel, each defendant made clear that he wanted to stick with his current attorney.

We note that the district court must recognize a presumption in favor of a defendant's counsel of choice. *Wheat v. United States*, 486 U.S. 153, 164 (1988). The district court, with this presumption in mind, chose to respect the decision of the defendants. We do the same. Flores, Fontanez, and Rodriguez, made their decision to waive their right to conflict-free counsel before the district court and cannot now reverse course.

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[6] The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The defendants' other argument—that their waivers are not valid because most of their answers at the Rule 44(c) hearing consisted of only one or two words—is also without merit. In *United States v. Kladouris*, 964 F.2d 658 (7th Cir. 1992), the criminal defendant waived her right to conflict-free counsel by answering the district court with such brief answers as: "Yes, sir.;" "Yes, sir.;" "No, I don't, because I'm not.;" "Yes, sir.;" and "No." *Id.* at 666-667. We affirmed the district court's decision that such a waiver was valid and affirmed the defendant's conviction. Similarly, we affirm here. The defendants answers at the Rule 44(c) hearing adequately expressed their preferences.[7] We respect the defendants' choice of trial counsel and hold that the defendants waived their Sixth Amendment right to conflict-free counsel.

B. Section 2255 Petition of Flores and Rodriguez

While their direct appeals were pending, Flores and Rodriguez filed collateral attacks in the district court pursuant to section 2255. The district court denied relief. In their section 2255 petition, Flores and Rodriguez repeat their argument that their waivers of conflict-free counsel were neither knowing nor voluntary, but for different reasons than they gave before. They claim that their answers to the district court's questions at the Rule 44(c) hearing were prompted by their lawyers. Flores argues additionally that he was denied his Sixth Amendment right to counsel because his attorney was more interested in a civil case that was then pending in Hawaii.

We begin our analysis of this claim by noting that the grounds for relief under section 2255 are very narrow. *Basile v. United States*, No. 92-3118, 1993 U.S. App. LEXIS 18518 (7th Cir. July 21, 1993). Flores and Rodriguez can recover if they can show that their Sixth Amendment right to the effective assistance of counsel was violated.

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[7] We note as an additional matter that by severing Rodriguez's trial, the district court adequately disposed of any conflict of interest that might have occurred if all the defendants had been tried together.

Their argument on this ground fails for two reasons. First, their contention that their answers were prompted by their attorney is not supported by the record. Affidavits submitted by their attorneys before the district court refute their claim. The district court concluded—and we agree—that these claims are merely post-hoc rationalizations put forth by Flores and Rodriguez to persuade the district court to vacate their convictions. Flores and Rodriguez waived their right to conflict-free counsel in open court, of their own free will. We refuse to say that merely by alleging—with no other support—that their waivers were "prompted" by their attorney entitles them to a hearing on the issue. This is exactly the kind of whipsawing that the Supreme Court has explicitly cautioned against. *Wheat*, 486 U.S. at 161. Flores and Rodriguez have failed in their attempt to persuade us that their waivers were invalid.

The only other section 2255 issue is whether Flores has sufficiently alleged a Sixth Amendment ineffective assistance of counsel claim against Green because Green allegedly placed greater emphasis on his work in another client's civil case then pending in Hawaii than he did on Flores' criminal case.[8] To state a valid claim for ineffective assistance of counsel, Flores first had to show that Green's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States ex rel. Duncan v. O'Leary*, 806 F.2d 1307, 1312 (7th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Second, Flores had to show that Green's deficient performance prejudiced his defense. This second prong requires a showing that Green's errors were so serious as to deprive Flores of a fair trial, that is, of a trial whose result is reliable. *Strickland*, 466 U.S. at 687; *O'Leary*, 806 F.2d at 1312. To succeed, Flores is required to make both showings. *Strickland*, 466 U.S. at 687. He has made neither.

[8] By waiving his right to conflict-free counsel, Flores waived only his right to effective assistance of counsel as it relates to any conflict of interest issues. *Lowry*, 971 F.2d at 63. Flores did not waive any other ineffective assistance of counsel claim.

To begin with, Flores presents nothing that suggests that Green's performance was deficient. Flores points to nothing Green should have or could have done that Green did not do and therefore fails to rebut our presumption that Green effectively assisted Flores. *Biggerstaff v. Clark*, No. 92-1129, 1993 U.S. App. LEXIS 18815 (7th Cir. July 22, 1993). The abundant evidence against Flores also establishes that the result of the trial—Flores' conviction—was reliable.

Flores' allegation that Green placed more emphasis on a Hawaiian civil case than on Flores' criminal case adds nothing. All attorneys must make decisions about how to allocate their scarce lawyerly resources among the many clients they may represent at any given time. Evaluating such decisions is not within the province of this court. We ask only whether a lawyer—here, Green—performed adequately in *this* case. Our review of the record indicates that Green's performance was more than adequate and easily satisfies the requirements of the Sixth Amendment.

Both Flores and Rodriguez have failed to state a valid claim for relief pursuant to section 2255. Accordingly, we affirm the district court's decision to deny their section 2255 petitions.

C. Evidentiary Challenge by Rodriguez

Rodriguez argues that the district court erred when it allowed Cabral to testify that the cocaine distribution conspiracy extended as far back in time as 1988. He claims that such testimony was admitted in violation of Federal Rules of Evidence 403 and 404(b).[9]

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[9] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.R. Evid. 403. Rule 404(b) states as follows:

(Footnote continued on following page)

We review a district court's evidentiary rulings for abuse of discretion. *United States v. Smith*, Nos. 91-2297, 91-2563 & 91-3143, 1993 WL 137782 (7th Cir. May 3, 1993). The test for admissibility of past act evidence under Rules 403 and 404(b) is whether:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

United States v. Shields, Nos. 92-1683 & 92-2237, 1993 U.S. App. LEXIS 17474 (7th Cir. July 14, 1993) (citation omitted). Cabral's testimony in this case satisfies all four parts of this test. First, Rodriguez's membership in the cocaine distribution conspiracy was a matter in issue. Cabral's testimony establishes that Rodriguez was a part of the on-going criminal conspiracy since at least 1988. Cabral's testimony did not relate to Rodriguez's propensity to distribute cocaine as a general matter. Second, Cabral's testimony, which reaches back some two years before the FBI arrested Rodriguez, is easily close enough in time to be relevant to events charged in this case. *See Smith*,

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[9] *continued*

> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

F.R. Evid. 404(b).

Nos. 91-2297, 91-2563 & 91-3143, slip op. at 16 (evidence properly admitted where two years separated the prior act and the charged acts); *United States v. Goodapple*, 958 F.2d 1402, 1407 (7th Cir. 1992) (evidence of transaction five years prior to those charged properly admitted). Third, Cabral's testimony supports a jury finding that Rodriguez conspired to distribute cocaine since 1988. Finally, the probative value of Cabral's testimony is not substantially outweighed by any danger of unfair prejudice. The district court properly admitted Cabral's testimony about Rodriguez's pre-indictment involvement in the cocaine distribution conspiracy.

D. Challenge to Sentencing by Flores and Rodriguez

Flores and Rodriguez claim that the district court did not follow the appropriate procedures when it sentenced them. Specifically, they contend that the district court improperly enhanced their sentences without complying with the requirements of 21 U.S.C. § 851(b).[10] That statute sets forth the requirements that the government, the criminal defendant, and the district court must follow when the government seeks to enhance the defendant's sentence because of prior convictions. Section 851(a) requires the government to file an information with the court before trial which "states in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). If the government complies, as it did in this case, section 851(b) directs the district court, before pronouncement of sentence, to ask the

[10] Section 851(b) states:

> (b) If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

21 U.S.C. § 851(b).

defendant whether the defendant affirms or denies that alleged prior conviction. Rodriguez and Flores argue—quite accurately—that the district court did not comply with this requirement. No matter, Rodriguez and Flores' argument still fails.

Flores' argument fails because he was sentenced under the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G"). Section 851 applies to persons convicted of an offense under Title 21 "when the government seeks to enhance the maximum penalty under the recidivist provisions of that statute. The statute does not apply, however, when sentencing is conducted under the Sentencing Guidelines and the defendant receives an increased sentence which is within the statutory range." *United States v. Belanger*, 970 F.2d 416, 417 n.1 (7th Cir. 1992) (citations omitted). The maximum penalty prescribed for a violation of two of the three statutes Flores was convicted of—sections 841(a)(1) and section 846—is life imprisonment.[11] Flores received a sentence of 364 months pursuant to the Guidelines. This sentence is within the statutory range. Therefore, the requirements of section 851 do not apply.

Rodriguez's section 851(b) argument fails as well, but for different reasons. The district court sentenced Rodriguez to life imprisonment and fined him $25,000 pursuant to 21 U.S.C. § 841(b)(1)(A).[12] Section 851's requirements

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[11] For example, section 841(b)(1)(A) states in relevant part:

> **(1)(A)** In the case of a violation of subsection (a) of this section involving—. . . **(ii)** 5 kilograms or more of a mixture or substance containing a detectable amount of—. . . **(II)** cocaine such person be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .

21 U.S.C. 841(b)(1)(A).

[12] The relevant section of this statute, as far as Rodriguez's sentence is concerned, reads as follows:

> If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense

(Footnote continued on following page)

apply, therefore, because Rodriguez was not sentenced pursuant to the Guidelines. The government's information reveals that Rodriguez's two prior convictions, for sentence enhancement purposes, are a 1976 Cook County, Illinois conviction for heroin delivery and a 1982 federal conviction in Puerto Rico for a drug conspiracy and possession with intent to distribute five kilograms of cocaine.

Section 851(e) prohibits a defendant from challenging a conviction that is more than five years old.[13] A district court is not required to "adhere to the rituals of § 851(b) where a defendant, as a matter of law, is precluded from attacking the conviction forming the basis of the enhancement information." *United States v. Nanez*, 694 F.2d 405, 413 (5th Cir. 1982), *cert. denied*, 461 U.S. 909 (1983). *See also United States v. Fragoso*, 978 F.2d 896, 902 (5th Cir. 1992) (trial court need not adhere to requirements of section 851(b) where conviction more than five years old), *cert. denied*, 113 S. Ct. 1664 (1993); *United States v. Housley*, 907 F.2d 920, 921-22 (9th Cir. 1990) (same); *United States v. Weaver*, 905 F.2d 1466, 1482 (11th Cir. 1990) (same), *cert. denied*, 498 U.S. 1091 (1991). The government filed the information in this case on January 28, 1991. Rodriguez's two prior convictions occurred more than five years before that date. The requirements of section 851(b) do not apply.

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[12] *continued*

> have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.

21 U.S.C. § 841(b)(1)(A). The "preceding sentence" provides for fines of up to "$8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both." *Id.*

[13] Section 851(e) provides:

> (e) No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

21 U.S.C. § 851(e).

E. Responsibility of Fontanez for Sentencing Purposes

Fontanez contends that the district erroneously considered drug transactions for sentencing purposes that were not part of his conspiratorial agreement and therefore not reasonably foreseeable to him. Fontanez insists that he is responsible for only thirty-one kilograms of cocaine, not the full amount of all drug transactions identified at trial. He thus claims that his Base Offense Level under the Guidelines should be 34, not 36 as the district court found.[14] The district court disagreed, found Fontanez liable for the full amount, and sentenced him accordingly. Direct evidence linked Fontanez to the thirty-four kilogram amount. Fontanez argues that any quantity above this was the result of transactions that were not a part of his conspiratorial agreement. His claim is that his conspiratorial agreement did not encompass any transaction where he was not present. The issue, then, is: what exactly was the extent of Fontanez's conspiratorial agreement?

This question does not produce an obvious answer. There is no written text that we can look to in order to discern the intent of the parties to the conspiratorial agreement. Cocaine conspirators do not ordinarily commit their mental agreements to written contracts. They tend to rely on informal oral contracts that are, by their very nature, difficult for district courts to reconstruct at sentencing.

Fortunately, the Guidelines provide a method for solving this problem. The Guidelines require district courts to sentence a criminal conspiracy defendant on the basis of all acts committed by the defendant for which the defendant "would be otherwise accountable." U.S.S.G. §1B1.3. Application Note 1 defines conduct for which a defendant

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[14] Fontanez was sentenced in April 4, 1991. Thus, the Guidelines applicable as of November 1, 1990 apply. Under those Guidelines, a Base Offense Level of 34 applies to defendants found liable for at least fifteen but less than fifty kilograms of cocaine. A Base Offense Level of 36 applies to defendants found liable for at least fifty but less than 150 kilograms of cocaine. U.S.S.G. §2D1.1(c)(5).

"would be otherwise accountable" as "conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was *reasonably foreseeable* by the defendant."[15] U.S.S.G. §1B1.3, comment. (n.1) (emphasis added).

Reasonable foreseeability refers to the scope of the agreement that Fontanez entered into when he joined the conspiracy, not merely to the drugs he may have known about. *United States v. Edwards*, 945 F.2d 1387, 1403 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1590 (1992). The district court noted the following evidence against Fontanez: (1) Rodriguez told Cabral the day after Fontanez was arrested that Fontanez was a long-time "trusted worker;" (2) the 120.4 kilogram quantity of cocaine, which the district court used, was a conservative amount, given Cabral's testimony; (3) Fontanez rented the stash apartment in February 1990; and (4) Cabral testified that Fontanez's involvement in the cocaine distribution operation began at least as early as the summer of 1990, well before the first of the eleven transactions which helped comprise the full 120.4 kilogram amount.[16] The district court applied the appropriate preponderance of the evidence standard, accepted these facts as established, and concluded that the full quantity of cocaine was reasonably foreseeable to Fontanez. *See United States v. Ruffin*, No. 92-1335, 1993 WL 230044 (7th Cir. June 29, 1993) (articulating preponderance of the evidence standard for sentencing). We will reverse the district court's finding only if it is clearly erroneous.

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[15] The commentary that interprets or explains a guideline is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 113 S. Ct. 1913, 1915 (1993). There is nothing in Application Note 1 to U.S.S.G. §1B1.3 that violates the Constitution or a federal statute or is inconsistent with, or a plainly erroneous reading of, that guideline. We therefore treat it as authoritative.

[16] *See* note 3, *supra*, which sets out the eleven transactions that Cabral testified to.

18 U.S.C. § 3742(e); *United States v. Villareal*, 977 F.2d 1077, 1080 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993). It was not clearly erroneous.

Fontanez argues that the district court failed to conduct the kind of individualized inquiry that we described in *Edwards*. 945 F.2d at 1399. In *Edwards*, we discussed the reasonably foreseeable standard at some length and directed district judges, when applying this standard, to set forth the reasons why the particular amount of drugs was reasonably foreseeable to the criminal conspiracy defendant. *Id.*

The district court complied with *Edwards* when it sentenced Fontanez. At sentencing and after giving both Fontanez and Assistant United States Attorney Sean Martin an opportunity to make their case, the court concluded as follows:

> THE COURT: I do find by a preponderance of the evidence that Mr. Fontanez was a knowledgeable conspirator with respect to the scope of the activities between Mr. Flores, Mr. Rodriguez, Mr. Cabral, at least as early as August 1990. He rented the apartment, which was in effect a drug house for this operation, I believe it was in February or March of that year; it was considerably earlier.
>
> MR. MARTIN: February 1990, your Honor.
>
> THE COURT: It was an apartment filled with very little besides baggies and a scale, as I recall, some drug records.
>
> And given that kind of corroboration, plus Mr. Cabral's testimony, I think the record sufficiently supports a finding by a preponderance of the evidence that the full 120 kilos, which is a conservative government estimate, is relevant conduct to this offense. So therefore, I overrule the objection with respect to the base offense level of 36.

April 4, 1991 Sentencing Transcript at 9-10. This individualized inquiry by the district court satisfies *Edwards*. The

district court's findings are not clearly erroneous. We affirm Fontanez's sentence.

III.

The convictions and sentences of Flores, Rodriguez, and Fontanez are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: September 23, 1993

BEFORE:
Honorable WILLIAM J. BAUER, Chief Judge
Honorable JOEL M. COFFEY, Circuit Judge
Honorable GARNETT THOMAS EISELE,
Senior District Judge*

Nos. 91-1839, 91-1854, and 91-2007

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FEILBERTO FLORES, ANGEL L. FONTANEZ and AMADOR RODRIGUEZ,

Defendants-Appellants

Nos. 92-1203 and 92-1204

FEILBERTO FLORES and AMADOR RODRIGUEZ,

Petitioners-Appellants

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

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* The Honorable Garnett Thomas Eisele, Senior Judge of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 90 CR 848 & 91 C 6959, Suzanne Conlon, Judge.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

[Received January 29, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

FEILBERTO FLORES, ANGEL L. FONTANEZ, and AMADOR RODRIGUEZ

No. 90 CR 848—Judge Suzanne B. Conlon

GOVERNMENT'S MOTION FOR A HEARING PURSUANT TO RULE 44(C) AND/OR TO DISQUALIFY COUNSEL

Now comes the UNITED STATES OF AMERICA, by and through its attorney, FRED FOREMAN, and moves this Court to disqualify Mr. Glenn Seiden, current counsel for Amador Rodriguez, Michael Green, current counsel for Feilberto Flores, and Ms. Roberta Samotny, current counsel for Angel Fontanez. The basis for this motion are conflicts of interest, based upon: (1) Mr. Seiden's previous representation of Angel Fontanez in this instant case, one of his client Rodriguez's co-defendants; (2) Mr. Green's representation of Amador Rodriguez in a previous case, one of his client Flores' co-defendants; and (3) Ms. Samotny's representation of Amador Rodriguez in a previous case, one of her client Fontanez's co-defendants. The gov-

ernment also moves for a hearing on this subject authorized by Fed. R. Crim. P. 44(c).

The government objects to Mr. Seiden's change of representation from Fontanez to Rodriguez in this case, and requests this Court to disqualify Mr. Seiden from representing defendant Rodriguez. The government objects to Mr. Green's representation of Angel Fontanez because he represented Amador Rodriguez in a previous drug-related case. The government objects to Ms. Samotny's representation of Angel Fontanez because she represented Amador Rodriguez in a previous drug-related case. The attorneys' representations of their clients in this case are a virtual hornet's nest of conflicts of interest. In support of its motion, the government states as follows.

A) *Background of Proceedings*

The proceedings in this case began with the arrest of Angel Fontanez and Feilberto Flores on October 4, 1990. They were arrested in Fontanez's apartment after Fontanez picked up six kilograms of cocaine from another individual that evening and brought it back to Feilberto Flores, who was waiting in the apartment. The pickup was arranged through a series of taped phone calls between the other individual and Feilberto Flores. Amador Rodriguez was not in the apartment at the time of the arrest, although items apparently belonging to Rodriguez were found in the apartment. In the two days following the arrests, October 5 and October 6, Rodriguez spoke to the individual who provided the cocaine to Flores and Fontanez, in order to continue the conspiracy. Rodriguez made no further contacts to the other individual after this date because Rodriguez then had to report to federal prison in Terre Haute, Indiana for surrender on a probation revocation.

The initial appearance for Angel Fontanez and Feilberto Flores was held before Magistrate Weisberg on October 5, 1990. At that time, Ms. Roberta Samotny entered her appearance on behalf of Angel Fontanez. Mr. Glenn Seiden also filed an appearance for Mr. Fontanez between October 5 and October 9. Mr. Seiden and Ms. Samotny represented Fontanez through Fontanez's detention hearings, preliminary examination hearing, and arraignment on the original indictment. Mr. Seiden and Ms. Samotny continued to represent Mr. Fontanez in preparation for trial which was originally scheduled to begin January 2, 1991.

On December 19, 1990, the grand jury returned a superseding indictment which added an additional defendant, Amador Rodriguez. The superseding indictment charges that Amador Rodriguez participated in an on-going cocaine distribution conspiracy with Fontanez and Flores, and that Rodriguez continued the conspiracy after the arrests of Fontanez and Flores. At Fontanez's and Rodriguez's arraignment on the superseding indictment on January 8, 1991, Ms. Roberta Samotny represented Fontanez. At that arraignment Mr. Seiden moved for leave to withdraw as counsel for Angel Fontanez and for leave to file an appearance on behalf of the new co-defendant, Amador Rodriguez. This motion was granted.

While preparing for this trial by ordering government documents related to a previous criminal case involving Amador Rodriguez, *United States v. Amador Rodriguez*, 86 CR 698 (N.D. Ill.), government counsel has learned that Mr. Michael Green represented Rodriguez in the prosecution of that case. In that case, Rodriguez was charged with one count of possessing approximately 2995 grams of heroin with the intent to distribute, and two counts of failing to file tax returns. Rodriguez pleaded guilty to one of the tax counts and was sentenced by Judge Nord-

berg to a term of incarceration. After his incarceration, Rodriguez was placed on probation.

While out on probation, Rodriguez participated in a very large drug transaction involving numerous defendants in Ohio. Those defendants were represented jointly by Mr. Green, Ms. Samotny, and Mr. Seiden. Rodriguez was not prosecuted by Ohio authorities for his activities in Ohio while on probation, but Judge Nordberg in this district revoked his probation for these activities. During the probation revocation hearing, Rodriguez was represented by Ms. Samotny and Mr. Seiden.

What emerges from this picture is a tangled web of interlocking and inherent conflicts of interest, created by attorneys who switched representation at will for a related set of clients. This Court should disqualify Mr. Seiden from representing Rodriguez in this case, based on his representation of Rodriguez's co-defendant Fontanez up to and including the arraignment on the superseding indictment in this case. This Court should disqualify Mr. Green from representing Feilberto Flores in this case, based on his representation of Amador Rodriguez in a prior drug case. This Court should also disqualify Ms. Samotny from representation of Fontanez in this case, based upon her previous representation of Fontanez's co-defendant Amador Rodriguez in a prior drug case. Mr. Seiden, Mr. Green, and Ms. Samotny have and will continue to have actual conflicts of interest because the confidential information Mr. Seiden learned from Mr. Fontanez during the course of his representation, information Mr. Green learned from Mr. Rodriguez during his previous representation, and information Ms. Samotny learned from Mr. Rodriguez during her previous representation.

B) *Mr. Seiden, Mr. Green, and Ms. Samotny Have Conflicts Of Interest Based On Their Prior Representations Of Co-Defendants In This Case.*

In making this motion, the government acknowledges that disqualification is a serious measure which court should hesitate to impose except when necessary. *See Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982). In this case, however, disqualification is necessary (1) to enforce the lawyers' duty of absolute fidelity to their former and current clients, (2) to guard against the use of confidential information obtained from the lawyers' former clients, and (3) to maintain public confidence in the legal profession and protect the integrity of the judicial process. *See Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713, 715 (7th Cir. 1977) (recognizing the delicate balance which must be maintained between the right of an individual to retain counsel of his free choice and the necessity that the Court uphold ethical standards).

In deciding whether to exercise its supervisory authority to avoid conflicts of interest and to protect the integrity of the judicial process, this Court must balance two Sixth Amendment rights: (1) the qualified right of a defendant to be represented by counsel of one's choice, and (2) the right of the defendant, the Court, and the public to a trial conducted by an attorney who is free of conflicts of interest. *Wheat v. United States*, 108 S.Ct. 1692, 1697 (1988) (". . . the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to assure that a defendant will inexorably be represented by the lawyer whom he prefers"). In balancing these rights, the Court must consider the interests of the defendant, the client formerly represented by the attorneys, and the court and public in a fair trial. *United States v. O'Malley*, 786 F.2d 786, 790 (7th Cir. 1986).

The first factor for the Court to consider is the interest of Amador Rodriguez, Feilberto Flores, and Angel Fontanez in retaining their preferred counsel. *O'Malley*, 786 F.2d at 790. At this stage of these proceedings, there is no apparent reason to believe that these defendants would be prejudiced too substantially by the disqualification of Mr. Seiden, Mr. Green, and Ms. Samotny. Mr. Seiden has only been representing Mr. Rodriguez in this case since January 8, 1991, Mr. Rodriguez's arraignment date. Ms. Samotny has been representing Mr. Fontanez since October 5, 1990. Mr. Green is joined by local co-counsel Mr. David Peilet, who could easily take over representation of Flores. The government has made all discovery materials available to all defendants, and it would continue to do so should new counsel enter the case. The government recognizes that the trial date is approaching in this case, yet it was Mr. Seiden's decision to switch representation of clients after the filing of the superseding indictment, and Mr. Green's and Ms. Samotny's decision to continue representing Flores and Fontanez after co-defendant Rodriguez, their former client, was added to this case. There is still sufficient time to obtain new lawyers for Rodriguez, Fontanez, and Flores. Thus, there would be little prejudice engendered by replacing Mr. Seiden, Ms. Samotny, and Mr. Green with counsel free from conflicts.

The second factor for the Court to consider is the interest of the co-defendants who were formerly represented by Mr. Seiden, Mr. Green, and Ms. Samotny. *O'Malley*, 786 F.2d at 790. Simply put, each defendant cannot obtain the completely free and independent advice of an independent counsel in this convoluted, conflicted, and untenable situation. This is clearly a strong factor in support of disqualification and it should be weighed heavily.

Mr. Seiden represented Fontanez from shortly after his initial appearance, through his detention hearings, preliminary examination hearing, arraignment on the original indictment, and in preparation for the original January 2, 1991. It is a reasonable assumption that Mr. Seiden diligently prepared for and crafted Fontanez's defense, which certainly resulted in numerous contacts and confidential communications between lawyer and client. If his former client Fontanez were to testify at trial, Mr. Seiden's cross-examination would undoubtedly involve the subject matter of their confidential communications. Even if Fontanez were to decide not to testify at trial, his decision would necessarily be unduly influenced, if not controlled, by his knowledge that his former counsel could cross-examine him with the information previously provided to him in confidence. Under the facts of this case, a quite plausible defense for Fontanez would be for him to deny knowledge and participation of the conspiracy and pin ownership of the cocaine and heroin on co-defendants Flores and Rodriguez. Needless to say, any decision by Fontanez to present such a defense could be scuttled by an expected vigorous cross-examination by his former attorney on the subject matter of their previously confidential communications. At that point, there is a substantial risk of illegitimate intrusion into the former client's attorney-client privilege.

Ms. Samotny and Mr. Green present the identical danger to Amador Rodriguez. Ms. Samotny and Mr. Green previously represented Rodriguez in drug-related prior cases. As it is with Mr. Seiden, it is a fair assumption that Ms. Samotny and Mr. Green had substantial client contact with their former client Rodriguez and learned much information through confidential communications protected by the attorney-client privilege. Ms. Samotny or Mr. Green

could well use that information to cross-examine Amador Rodriguez, and the mere knowledge of those confidential communications might well chill Rodriguez's freedom to testify in his own defense. Under the facts of this case, a plausible defense for Rodriguez would be for him to deny knowledge or participation in the cocaine conspiracy up to October 4, 1990, and point ownership of the cocaine and heroin on Flores and Fontanez, the two individuals arrested in the apartment with the drugs. Rodriguez could then claim that his activities on October 5 and October 6 were innocent and nonconspiratorial activities done at the request of the co-defendants to contact the confidential informant for them while they were in jail. Obviously, such a defense might be squelched by Ms. Samotny's and Mr. Green's cross-examinations which could incorporate privileged information learned from Rodriguez during the previous attorney-client relationships in drug-related cases.

Each defendant in this case requires the absolute independence of unconflicted counsel because each stands in different postures. Each defendant has differing interests with respect to their incentive to plead guilty cooperate with the government. Because of Amador Rodriguez's two prior felony drug convictions, he faces a mandatory term of life imprisonment if convicted in this case. 21 U.S.C. §§846, 841(b)(1)(A). The only means by which Rodriguez can reduce his exposure to this term of imprisonment is if he provides substantial assistance to the government and the government moves for a departure below the statutory mandatory minimum term. 18 U.S.C. §3553(e). This is a powerful incentive to cooperate and testify against his co-defendants. Feilberto Flores faces a mandatory minimum term of twenty years' incarceration if convicted in this case, and, like Rodriguez, can only reduce his exposure by cooperating with the government against his co-defendants. 21 U.S.C. §§846, 841(b)(1)(A); 18 U.S.C. § 3553(e).

In contrast, Angel Fontanez faces only a ten year mandatory minimum period of incarceration; if Fontanez cooperated with the government and testified against his co-defendants, his exposure could be substantially reduced. 21 U.S.C. §§846, 841(b)(1)(A); 18 U.S.C. §3553(e). In order for these defendants to be able to make these critical decisions in their own self-interest, they require counsel who are not beholden in any way to their former clients who are also co-defendants.

The third factor for the Court to consider is its own interest and that of the public in a fair trial. *O'Malley*, 786 F.2d at 790. The federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. *Wheat*, 108 S.Ct. at 1697. These are not mere platitudes. Rather, they speak to the Court's ability and duty to prevent the byzantine type of cross-representation this case presents.

If Angel Fontanez or Amador Rodriguez were to testify at the trial of this case, Mr. Seiden will confront insurmountable ethical problems in cross-examination or direct-examination. If Amador Rodriguez were to testify, Mr. Green and Ms. Samothy would be in the same position.[1]

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[1] The attorneys may respond that the testimony at trial of Fontanez or Rodriguez is unlikely or speculative at this time. Obviously, the government cannot predict with certainty whether either defendant will choose to testify. However, should such testimony occur, the conflict of interest would be manifest and insurmountable. Rather than wait and risk the necessity of a mistrial should such testimony occur, the Court should resolve the matter now by declaring the potential dangers too great to warrant the continued presence of Messrs. Seiden and Green and Ms. Samotny in the case.

The attorneys simply will not be able to fulfill their duty to represent vigorously and effectively their current client and, at the same time, preserve confidences revealed to him by their former client. *Compare* Illinois Code of Professional Responsibility, Ill. Rev. Stat. Ch. 110A, DR 7-101(A) (requiring an attorney to represent his client zealously within the bounds of the law) with DR 4-101(B) (preventing an attorney from exploiting confidential communications learned during the existence of an attorney/client relationship on subsequent occasions after that relationship has ended).

Because of the patent and extant conflicts of interest inherent in such situations, federal courts routinely uphold decisions disqualifying defense counsel who represented a co-defendant or witness on previous occasions. *See, e.g., United States v. Ditemasso*, 817 F.2d 201, 219-220 (2d Cir. 1987) (attorney disqualified because during prior representation of a co-defendant he "was likely to have had access to privileged information potentially relevant to the present case"); *United States v. James*, 708 F.2d 40 (2d Cir. 1983); *United States v. Sanders*, 690 F. Supp. 677 (N.D. Ill. 1988) (disqualification necessary where counsel previously represented government witness in commodities fraud prosecution, notwithstanding defendant's willingness to waive potential conflict issue). Such disqualification is both appropriate and necessary here.

Given the actual and potential conflicts of interest in this case, a waiver from Angel Fontanez, Feilberto Flores, and Amador Rodriguez would not cure any of the problems. Although appellate courts will on occasion affirm convictions of defendant whose counsel labored under a conflict of interest, where defendants were carefully advised and admonished of the effect of the waiver, the Supreme Court observed in *Wheat* that there remains an

"apparent willingness" within appellate courts to "entertain ineffective assistance of counsel claims from defendants who have specifically waived the right to conflict-free counsel." 108 S.Ct. at 1698. Such a claim would certainly be likely in this case if any of the defendants are convicted.

Further, defendants' wishes, although accorded weight, are not controlling. The Court should properly consider its own interest, those of other defendants, and the public interest in criminal procedures which bear the appearance of legitimacy and propriety. *See O'Malley,* 786 F.2d at 790-91. The attorneys' continued representation of these clients would not only constitute a breach of professional ethics and invite disrespect for the integrity of the Court, but would also be detrimental to the independent interest of this Court to be free of future attacks regarding the adequacy of any waiver from the defendants and the fairness of the proceedings. *See* Advisory Committee Notes to Rule 44(c), Fed. R. Crim. P.; *United States v. Dempsey,* 89 CR 666 (N.D. Ill., August 13, 1989) (attached); *United States v. Frau,* 89 CR 597-3 (N.D. Ill.) (Sept. 22, 1989) (attached). In *Frau* and *Dempsey,* both courts rejected waivers from the defendants and disqualified lawyers because of conflicts of interest.

Particularly in a case such as this where strong interests favor disqualification, and where there are no equally powerful countervailing considerations which militate in favor of permitting continued representation, this Court should disqualify the attorneys in this case.

C) *Rule 44(c) Hearing*

Defendants are not like musical chairs, with attorneys free to shift and switch between co-defendants whenever a new prosecution is initiated. At a minimum, this Court should require a full and detailed hearing pursuant to Rule 44(c) of the Federal Rules of Criminal Procedure. Under Rule 44(c), "[u]nless it appears that there is good cause to believe that no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect defendant's right to counsel." For the reasons detailed herein, the government believes that there is good cause to believe that a conflict of interest situation has already arisen, that it will continue, and that it will be exacerbated at trial. Accordingly, the government believes that Rule 44(c) requires this Court to explore the means by which both of the defendants involved can be provided with that which the Sixth Amendment requires: competent assistance of counsel, albeit not counsel initially selected by a given defendant. *Wheat*, 108 S.Ct. at 1697.

Any decision made by this Court on this topic is committed to its "broad discretion" and will be insulated from review except for abuse of such discretion. *Wheat*, 108 S.Ct. at 1699-1700. *See also, Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713, 715 (7th Cir. 1977).

Conclusion

Accordingly, for the reasons outlined above, the government respectfully requests that this Court exercise its inherent supervisory power to order attorneys Glenn Seiden, Roberta Samotny, and Michael Green disqualified from representing Amador Rodriguez in this case.

Respectfully submitted,

FRED FOREMAN
United States Attorney

By: /s/ SEAN MARTIN
SEAN MARTIN
Asst. U.S. Attorney

/s/ PAT KING by SBM
PATRICK J. KING
Asst. U.S. Attorney

[Filed February 8, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

FEILBERTO FLORES
ANGEL FONTANEZ

No. 90 CR 848—Judge Suzanne B. Conlon

MOTION FOR JUDICIAL INQUIRY

Now comes the UNITED STATES OF AMERICA by and through FRED FOREMAN, United States Attorney for the Northern District of Illinois and hereby asks this honorable Court to inquire of the Defendant FEILBERTO FLORES and his counsel concerning a possible conflict of interest in the representation of that defendant. In support of that motion the government states as follows:

1. On February 7, 1991, the government spoke with one of its witnesses, Carlos Cabral. In the course of that conversation, Cabral stated that he had previously assisted an individual named Jose Gomez in the payment of legal fees to counsel Michael Green.

2. Jose Gomez was a large scale distributor of cocaine, and Cabral had a relationship with Gomez in which he assisted in the distribution of Gomez' cocaine.

3. Gomez was arrested prosecuted and convicted in Miami, Florida prior to this date. In this criminal prosecution, Gomez was represented by Michael Green.

4. Cabral advised the government that he was instructed to send Michael Green large sums of money which in part constituted legal fees for his representation of Gomez.

5. Cabral further advised the government that he was instructed to send Green these fees to his office in Hawaii by means of wire transfer utilizing multiple fictitious names, and varying amounts. Cabral further advised the government that he did as he was instructed, and in fact had contact with Green's office to advise them as to the particulars of the incoming money orders including what names they would be arriving under.

6. This information was disclosed to Mr. Green on January 7, 1991 after the government learned of it.

7. Mr. Green advised the government that although he did represent Mr. Gomez, and his fees were paid by wire transfer, he did not believe that any potential existed for a conflict of interest.

8. The government is not presently aware of any other details concerning any past relationship between Mr. Green, and Mr. Cabral, and the undersigned assistant is not aware of any pending investigation concerning the transfer of funds between Mr. Gomez and Mr. Green. However, the government believes that there exists a potential that a claim of conflict of interest or ineffective assistance of counsel might later be raised by Mr. Flores based either upon a claim that Mr. Green limited his cross examination of Cabral concerning Mr. Gomez or others; or based upon some possible criminal conduct by Mr. Green concerning the transfer of funds.

WHEREFORE:

The government respectfully requests this honorable Court to inquire of the defendant FEILBERTO FLORES as to whether he is aware of any potential claims of conflict, and as to whether he knowingly waives any potential conflict arising from the above described representation of Gomez and receipt of funds by Green.

Respectfully submitted,

FRED FOREMAN
United States Attorney

By: /s/ PATRICK J. KING, JR.
PATRICK J. KING, JR.

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,

v.

FEILBERTO FLORES, et al., Defendants.

No. 90 CR 848—Chicago, Illinois
February 8, 1991, 9:00 a.m.

VOLUME I

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE
SUZANNE B. CONLON AND A JURY

APPEARANCES:

For the Plaintiff:	MR. PATRICK KING MR. SEAN MARTIN
For Defendant Flores:	MR. MICHAEL GREEN
For Defendant Fontanez:	MS. ROBERTA SAMOTNY

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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[9] MR. KING (A.U.S.A.): I can your Honor.

One of the things that I wanted to make—in one of our conversations last night I advised Mr. Green that in pretrying Mr. Carlos Cabral late yesterday he advised us that he had previously forwarded legal fees to Mr. Green on behalf of one of Mr. Green's former clients for whom Cabral had worked. And I advised Mr. Green of this fact and the amount of details that I was aware about. And Mr. Green advised me that he didn't feel that there was a conflict.

But I wanted to make it of record and make sure that—just so that we protect the record from any future or subsequent claims that there might be a claim of ineffective counsel, the extent of the information I drafted this morning when I got in.

THE COURT: Wait, wait, I don't understand.

Mr. Green, have you ever represented or had any contact with Mr. Cabral?

MR. GREEN (Trial Counsel for Flores): No. Judge, when the government called me last night and they said to me that you represented someone named Jose Gomez in Miami, I said, yes, I did. Well, our informant Cabral says that he sent you legal fees.

I didn't know Carlos Cabral, I mean in my memory, from anybody. And I was—and I told them I was sent money I thought from his family members. I don't know Cabral. And I [10] don't see that it poses any problem whatsoever.

And I mentioned it to my client, and he says it has no effect on my representation of him. And I don't see how—

THE COURT: And you don't intend to elicit testimony from Mr. Cabral as to this?

MR. KING: No, your Honor, I do not. I just want to protect the record and that is why I have prepared some-

thing which sets forth the exact nature of the claim. And the exact claim I'm trying to protect against is that there—because Cabral was engaged in past criminal conduct with Mr.—a prior client of Mr. Green, that there might be a claim that Mr. Green didn't cross examine him as vigorously because of that prior relationship, or because—

THE COURT: I assume the record will evidence a vigorous cross examination.

MR. GREEN: There will be no problem with my cross examination.

MR. KING: May I still have leave to file that, your Honor?

THE COURT: Yes, leave is granted.

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